DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service From the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band for Fixed Service	)))))	ET 97-99

PETITION FOR RECONSIDERATION OF DIRECTV ENTERPRISES, INC.

DIRECTV Enterprises, Inc.

Gary M. Epstein
John P. Janka
James H. Barker
Nandan M. Joshi
LATHAM & WATKINS
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 637-2200

June 5, 1997

Its Attorneys

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service From the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band for Fixed Service	)))))	ET 97-99

PETITION FOR RECONSIDERATION OF DIRECTV ENTERPRISES, INC.

DIRECTV Enterprises, Inc. ("DIRECTV"),[1] hereby petitions for reconsideration of the Commission's Order adopting rules and policies to facilitate the relocation of the digital electronic messaging service ("DEMS") from the 18.82 - 18.92 GHz and 19.16 - 19.26 GHz bands ("18 GHz band") to the 24.25 - 24.45 GHz and 25.05 - 25.25 GHz bands ("24 GHz band").[2] The Commission's adoption of the DEMS Order was arbitrary and capricious, and improperly taken without prior public notice to, or the opportunity for comment by, DIRECTV and other affected parties. The Commission's wholesale relocation of DEMS licensees to 24 GHz is unnecessary to address the Commission's limited national security concerns, and is wholly unsupported by evidence or reasoned analysis. DIRECTV therefore respectfully requests that the Commission reconsider the actions it took in the DEMS Order.

---

1 DIRECTV is a licensee in the DBS service and majority-owned subsidiary of HE Holdings, Inc., a Delaware corporation.

2 *Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service*, 62 Fed. Reg. 24, 576 (May 6, 1997) ("DEMS Order").

I. INTRODUCTION AND SUMMARY

DIRECTV operates America's premier direct broadcast satellite ("DBS") service, providing approximately 175 channels of digital video and audio programming to more than 2.5 million subscribers nationwide. DIRECTV has been engaged in developing an innovative plan to utilize the spectrum at 24.75 - 25.25 GHz to expand and enhance the quality of the DBS service that is available today to the American public. Concurrently with this Petition for Reconsideration, DIRECTV is filing a petition for rulemaking to allocate part of the 24 GHz band for use by the Fixed Satellite Service ("FSS"), in the Earth-to-space direction, for "feeder links" for Broadcast Satellite Service ("BSS") operations. That part of the 24 GHz band was allocated internationally for this use five years ago, and there is no international allocation for any service other than satellite services in that band in Region 2 (the Americas).[3] Correspondingly, DIRECTV also is filing an application to construct, launch and operate an expansion BSS system that will utilize part of the 24 GHz band to expand its existing DBS operations.[4]

On March 14, 1994, the full Commission and the International Bureau issued two interrelated orders that threaten to scuttle DIRECTV's plans for innovative satellite-based services using the 24 GHz band. The International Bureau's order granted Teledesic Corporation ("Teledesic") a license to operate an NGSO/FSS satellite system, including NGSO/FSS downlinks at 18.8 - 19.3 GHz, which includes the 18.82 - 18.92 and 19.16 - 19.26 GHz bands

---

3 *See* 47 C.F.R. §§ 2.104, 2.106.

4 *See* Application of DIRECTV Enterprises, Inc. for Authority to Construct, Launch and Operate an Expansion System of Direct Broadcast Satellites (June 5, 1997).

where DEMS has been authorized to date.[5] Concurrently, the DEMS Order, adopted by the full Commission without notice and comment procedures, amended the Commission's Table of Frequency Allocations and fixed microwave services rules to authorize the 24 GHz band for use by DEMS, and entirely relocated existing DEMS licensees into the 24 GHz band.[6]

The concurrent issuance of both the Teledesic Order and the DEMS Order constitutes the attempted resolution by the Commission of a multiparty dispute in the 18 GHz band, in which Teledesic claimed that DEMS operations would cause interference with its proposed satellite operations in that band, while the United States Government ("Government") claimed that DEMS operations would interfere with its ability to communicate with a military satellite, operating at 18 GHz, that uses earth stations in the Washington, D.C. and Denver, Colorado areas. To resolve this dispute, the Commission brokered a compromise. DEMS licensees would move their operations to the 24 GHz band, leaving Teledesic and the Government free to use the 18 GHz band for their satellite needs, with Teledesic agreeing to pay the costs of relocating the DEMS licensees. Even though the Government had claimed national security concerns only in the Washington, D.C. and Denver areas, the Commission nonetheless relocated DEMS operators *throughout the country* to 24 GHz.[7]

To effectuate this global arrangement, the Commission had to allocate the 24 GHz band to permit DEMS service. Part of that band had been allocated internationally for BSS

---

5 *Teledesic Corporation*, 12 FCC Rcd 3154 (1997) ("Teledesic Order").

6 DEMS licensees in the Washington, D.C. and Denver, Colorado areas are required to relocate immediately, while all other DEMS licensees are granted a four-year transition period to move to 24 GHz. DEMS Order at ¶ 20.

7 *Id.* at ¶ 10.

expansion purposes, but had not been allocated domestically for any commercial purpose (satellite or terrestrial). Normally, the Administrative Procedure Act ("APA") requires that such allocations be conducted using a notice and comment rulemaking proceeding in which interested parties, such as DIRECTV, may participate and present alternative or additional uses for the spectrum in question.[8] However, the Commission avoided entirely the notice and comment process mandated by law by using the existence of the military satellite system at 18 GHz to claim that its DEMS allocation in the 24 GHz band fell under two exceptions to the APA's notice and comment requirement: the "military function" exception and the "good cause" exception.

By law, these exceptions to the APA must be narrowly construed. Nonetheless, the Commission used them to cover sweeping regulatory action. The agency allocated the 24 GHz band for DEMS and, effective in the year 2001, relocated all DEMS licensees to that band; on the same day, the International Bureau granted Teledesic its license, and in one fell swoop, the deal ending the 18 GHz spectrum dispute was closed. While this arrangement accommodated the parties involved in the 18 GHz spectrum dispute, it did so at the expense of potential applicants for 24 GHz spectrum, such as DIRECTV, who were completely deprived of the opportunity to express their views on the proper allocation of that spectrum, and who now confront significant barriers to their use of the 24 GHz band in the event that the DEMS licenses are modified to permit operations in that band.

The Commission's actions, first, in relocating all existing DEMS licensees entirely out of the 18 GHz band, and second, in moving them to the 24 GHz band, each taken without notice and comment, were arbitrary, capricious and unlawful. In this case, the only

---

[8] *See* 5 U.S.C. § 553(b).

Commission action that conceivably warranted depriving interested parties of their fundamental procedural rights to notice and comment on the basis of protecting national security interests was the limited relocation of DEMS licensees out of the 18 GHz band in targeted areas in Washington, D.C. and Denver, Colorado. The remainder of the Commission's actions (*i.e.*, relocating *all* DEMS licensees in other areas of the country from 18 GHz, and subsequently choosing to relocate DEMS systems to the 24 GHz band, as opposed to some other band) may or may not constitute reasonable public policy choices. However, by the Commission's own admission, these additional actions are unnecessary to advance military functions; they are utterly unsupported by reasoned analysis or record evidence; and they are not justified by "good cause" that can or should shield Commission actions from comment by interested third parties who had no input into the compromise arrangement.

Indeed, the Commission's failure to conduct a notice and comment rulemaking in this case is particularly troubling when at least one private, Teledesic, has been privy to the Commission's deliberations and actually will provide a mechanism to effectuate the agency's action by paying to relocate DEMS licensees. While DIRECTV has no problem with regulatory action taken to facilitate "coordination with NGSO/FSS operations,"[9] or with private party efforts to facilitate that process, DIRECTV has its own interests at 24 GHz that can and should be accommodated. Those interests should be considered and addressed through appropriate APA processes in the light of day.

Finally, there is nothing in the DEMS Order that suggests that either the Government's national security interests or any other commercial interest will be prejudiced by

---

9 DEMS Order at ¶ 18.

initiating a notice and comment rulemaking. In the Washington, D.C. and Denver areas contested by the Government, which present the most compelling case for relocating certain DEMS licensees from 18 GHz, the Commission has interim procedures currently in place to protect Government operations.[10] Neither is there any exigency attending the relocation of DEMS licensees outside of Washington, D.C. and Denver -- indeed, the Commission itself has implemented a *four-year timeline* for their transition to 24 GHz. Nor are satellite interests at 18 GHz entitled to any greater rights than the other parties who are potentially affected by the agency's action. Interests in resolving NGSO/FSS-DEMS interference issues may warrant expedited agency action; in fact, expeditious resolution of this proceeding is important to DIRECTV as well. Assuming prompt Commission action on its application for an expansion BSS system, DIRECTV intends to begin construction on that system by the year 1999. But no party's commercial interests justify the complete elimination of notice and comment procedures that are fundamental to fair and orderly agency decisionmaking.

For these reasons, DIRECTV requests that the Commission conduct an expedited rulemaking to resolve the many issues raised by the relocation of DEMS licensees, taking into account the interests of all affected parties, and modify DEMS licenses appropriately based upon the results of that proceeding. Until that proceeding is concluded, and while the DEMS Order remains non-final, DEMS licensees are on notice that any actions taken to transition their operations to the 24 GHz band are taken at their own risk, and subject to the outcome of this and related proceedings.

---

10 *See id.* at ¶ 22.

II. BACKGROUND

This proceeding is the second in a series of Commission actions involving the 18 GHz band in which the Commission has invoked the "military function" exception to the APA.

In July 1995, the Commission issued an order granting the Government the authority to use the spectrum at 17.8 - 20.2 GHz for FSS downlinks.[11] At that time, the band was allocated domestically for commercial FSS downlinks,[12] with the band from 17.8 - 19.7 GHz also allocated to commercial terrestrial services, including DEMS.[13] The Commission granted the Government its spectrum authorization based on representations by the National Telecommunications and Information Administration ("NTIA") that the spectrum was required by the Department of Defense to satisfy "urgent national security interests."[14] Because of these national security needs, the Commission granted NTIA's request without notice and comment.[15]

In August 1996, Teledesic, which had a pending application to provide NGSO satellite services, filed an Interference Analysis asserting that its proposed system would be incompatible with DEMS operations at 18 GHz.[16] Teledesic claimed that it did not submit the Interference Analysis relating to DEMS with its original application in 1994 because it believed DEMS to be a "defunct service."[17]

---

11 *Amendment of Part 2 of the Commission's Rules,* 10 FCC Rcd 9931 (1995) ("Government Satellite Authorization Order").

12 *Id.* at ¶ 2.

13 *Id.*

14 *Id.* at ¶¶ 3-4.

15 *Id.* at ¶ 5.

16 Teledesic Order at ¶ 3.

17 *Id.* at ¶ 22.

Also in 1996, the Government became concerned about interference between its 18 GHz satellite service and DEMS. Although the Commission had established "interim coordination procedures" to protect Government operations at 18 GHz and to evaluate longer term solutions,[18] the NTIA determined that, because of interference problems, DEMS could not be provided within 40 kilometers of certain Government earth stations situated in the Washington, D.C. and Denver, Colorado areas.[19] Aware of "the Commission's desire to ensure the viability of DEMS" and to make "spectrum for DEMS . . . available on a nationwide basis," NTIA eventually proposed to forego Government use of the 24 GHz band if the Commission would relocate DEMS there.[20] In addition, the Commission was persuaded that DEMS would interfere with Teledesic's commercial interest in operating a satellite system at 18 GHz -- a determination that was wholly independent of whether the Government interference issues in Washington, D.C. and Denver could be addressed by a more narrowly tailored solution. The Commission acknowledged that the resolution of national security concerns could "be accomplished" by relocating "the Washington, D.C. and Denver, Colorado [DEMS] operations only"[21] to 24 GHz, but nevertheless agreed to relocate all DEMS licensees across the nation from the 18 GHz band to 24 GHz.[22] Teledesic in turn agreed to reimburse DEMS licensees for the costs of modifying existing equipment in order to operate in the 24 GHz band.[23]

---

18 DEMS Order at ¶ 3.

19 *Id.* at ¶ 4.

20 *Id.* at ¶ 6. The 24 GHz band was sparsely populated with Government radionavigation devices, which the Government agreed could be relocated. *Id.* at ¶¶ 5 - 6.

21 *Id.* at ¶ 11.

22 *Id.* at ¶¶ 6-10.

23 *Id.* at ¶ 10.

The Commission implemented this private settlement arrangement by issuing the DEMS Order without prior public notice or the opportunity for comment by interested third parties. The Commission justified its decision to forego notice and comment procedures on two grounds. First, the Commission stated that its action was taken in order to "ensure the Government's current and future ability to operate military space systems in the 18 GHz frequency band."[24] Based solely on this conclusion, the Commission determined that the proceeding fell within the "military function" exception to the rulemaking procedures required by the APA.[25] Second, to the extent it was relocating DEMS systems outside of Washington, D.C. or Denver -- which did not involve the exercise of a military function -- the Commission justified the move based upon a belief that "that it would not be practical to have DEMS operating in two bands on a long term basis because of the complications involved with coordinating with the Government earth stations, inconvenience to subscribers, and coordination with NGSO/FSS operations," and stated that its relocation "measures are necessary to ensure that DEMS service providers continue to be able to provide nationwide service."[26] After reciting these conclusions, the Commission determined that "notice and public comment and procedures" were "otherwise, for good cause shown, unnecessary and contrary to the public interest."[27]

---

24 *Id.* at ¶ 18.

25 5 U.S.C. § 553(a)(1).

26 DEMS Order at ¶ 18.

27 *Id.* at ¶ 18 (citing 5 U.S.C. § 553 (b)(3)(B)).

III. DIRECTV'S SUBSTANTIAL INTEREST IN DEVELOPING A BSS SYSTEM AT 24 GHz HAS BEEN ADVERSELY AFFECTED BY THE DEMS ORDER

DIRECTV operates the premier DBS system in the United States, delivering approximately 175 channels of high-quality digital video and audio programming on a nationwide basis, via small dishes approximately eighteen inches in diameter.

To improve the service that DIRECTV offers its customers, DIRECTV has been developing a complementary new satellite system designed to use part of the 24 GHz band to uplink to DIRECTV satellites. The 24.75 - 25.25 GHz band in Region 2 (the Americas) already has been allocated internationally for the fixed-satellite service in the Earth-to-space direction, with feeder links to DBS satellites given priority over all other FSS uses.[28] Until the DEMS Order, these 24 GHz frequencies had remained unallocated by the Commission for commercial use in the United States. Concurrently with this petition, DIRECTV is filing a petition for rulemaking to allocate part of the 24 GHz band for FSS feeder links (Earth-to-space) to support BSS/DBS service, and to use the 17.3 - 17.8 GHz band in the space-to-Earth direction to facilitate the provision of next-generation DBS service. DIRECTV also is filing an application for an expansion BSS system that will operate using these bands.

DIRECTV's interest in using the 24 GHz band is not recent. The band originally was allocated for FSS feeder links to the BSS in 1992,[29] and DIRECTV has invested significant time and money to develop the most efficient use of the band, with the introduction of a wider variety of innovative DBS direct-to-home, direct-to-business, and direct-to-school delivery of

---

28 *See* 47 C.F.R. § 2.106 and n. 882G.

29 International Telecommunication Union, Final Acts of the World Administrative Radio Conference (WARC-92) (1992), at 83 & n. 882G.

audio, data, multimedia and distance-learning services. These services are expected to include NTSC standard-definition and ATSC high-definition television formats.

Unfortunately, by issuing the DEMS Order, the Commission has adversely affected DIRECTV's plans without providing DIRECTV (or any other affected party) the opportunity to participate in the Commission's decision-making process, or to address the possible preclusive effect on BSS service of authorizing DEMS at 24 GHz. It is widely understood that transmitting earth stations present a potential for interference into nearby terrestrial receive antennas. The scope of the problem turns on a number of factors, such as the sensitivity of the terrestrial antenna and its proximity to the earth station, the strength of the terrestrial signal that is being transmitted, and the number and type of the transmitting earth stations in question. In a number of situations involving widely deployed terrestrial receive antennas, such as the type envisioned for DEMS, the Commission has determined that significant interference problems would arise from the deployment of satellite transmit earth stations in the same band, and it has decided or proposed to preclude earth stations from operating in the same part of the band as the terrestrial service.[30]

DIRECTV anticipates that its 24 GHz satellites will operate using multiple transmit earth stations, distributed in or near major cities around the United States. DIRECTV's preliminary analysis concludes that there will be zones around DIRECTV uplink earth stations at 24.75 - 25.25 GHz where DEMS receive antennas would likely receive unacceptable

---

30 *See, e.g., 28 GHz Proceeding, First Report and Order*, 3 Comm. Reg. (P&F) 857 (1996), at ¶¶ 25-28; *Allocation and Designation of Spectrum for Fixed-Satellite Services, et al.*, IB Docket No. 97-95 *Notice of Proposed Rulemaking* (released Mar. 24, 1997), at ¶ 12 & n. 11.

interference. Thus, it is critical that the scope of this problem, and its possible solutions, be explored in a rulemaking proceeding before DEMS licensees are permitted to relocate to 24 GHz. Otherwise, BSS operations at 24 GHz could be foreclosed by the operations of DEMS licensees in the band.

IV. THE COMMISSION IMPROPERLY RELOCATED ALL DEMS LICENSEES FROM 18 GHz, AND ALLOCATED THE 24 GHz BAND FOR DEMS USE, WITHOUT ENGAGING IN A REQUIRED NOTICE AND COMMENT RULEMAKING

A. Notice And Comment Are Essential And Fundamental Elements of Agency Decisionmaking And Can Be Waived Only In Limited And Exceptional Circumstances

The APA provides that "[g]eneral notice" of an agency's proposed rulemaking "shall be published in the Federal Register . . . ."[31] The Commission's rules reiterate this basic process by mandating that "prior notice of proposed rulemaking will be given."[32] While these requirements are subject to certain limited exceptions discussed below, they represent the fundamental cornerstone of the administrative rulemaking process.

The notice and comment rulemaking process serves two basic goals. First, it reintroduces "public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies,"[33] and gives "interested parties a reasonable opportunity to participate in the rulemaking process."[34] Without such a process, private parties

---

31 5 U.S.C. § 553(b).

32 47 C.F.R. § 1.412(a).

33 *MCI Telecommunications Corp. v. FCC*, 57 F.3d 1136, 1141 (D.C. Cir. 1995) (vacating the Commission's order allowing Bell Operating Companies to phase out bundled access offerings for failure to provide adequate notice in Notice of Proposed Rulemaking).

34 *Id.* at 1140.

would be bound by agency rules without having the ability to help shape them.[35] By issuing the DEMS Order without notice and comment, the Commission has treated "affected parties," such as DIRECTV, in a fundamentally unfair manner by binding them to the Commission's allocation and licensing decisions without giving them a chance to participate in and help shape that decision.

The notice and comment process also serves a second important purpose. It provides the Commission with "the facts and information relevant to a particular administrative problem."[36] By issuing the DEMS Order without notice and comment, the Commission acted without full knowledge of the "facts and information" necessary to determine whether its wholesale relocation of DEMS to 24 GHz from 18 GHz would make sense, or what impact the DEMS Order would have on other affected parties who had intended to use the 24 GHz band.[37] Had it conducted the proper notice and comment proceeding, the Commission would have received much more information about whether there are ways to resolve the interference issue at 18 GHz, and if necessary, what allocation of spectrum would best serve the public interest in the event that certain or all DEMS licensees must be moved. Indeed, the fact that the 24 GHz band has been allocated internationally for BSS use with the support of the United States at WARC-92 *is not even mentioned* in the DEMS Order. The international BSS allocation alone should have

---

35 *See National Family Planning v. Sullivan*, 979 F.2d 227, 240 (D.C. Cir. 1992).

36 *MCI*, 57 F.3d at 1141.

37 For example, the Commission should have explored whether allocating only 200 MHz to the fixed service for DEMS at 24 GHz, the same amount as was available for licensing to DEMS at 18 GHz, would have a less preclusive effect on other 24 GHz services. *See* DEMS Order at ¶ 12.

indicated to the Commission that other parties were proceeding with plans to develop the 24 GHz band for satellite systems.

Because notice and comment proceedings are so vital to the proper and just functioning of agency rulemaking, the exceptions that allow an agency to forego the notice and comment requirement are "narrowly construed and reluctantly countenanced."[38] The exceptions are not designed to be "escape clauses" by which the agency can avoid its notice and comment responsibilities,[39] and their mere invocation does not excuse the need for the agency to provide the factual foundation to justify its decision.[40] In its DEMS Order, the Commission invoked two exceptions to the notice and comment requirements of the APA: the military function exception and the good cause exception. As shown below, these exceptions do not and cannot justify the excessive breadth of the administrative action that the Commission has taken here without notice and comment.

B. Neither The Relocation Of DEMS From 18 GHz Nor The Allocation Of The 24 GHz Band To DEMS Falls Within The "Military Function" Exception To The APA

The Commission bases its failure to provide notice and comment regarding the allocation of the 24 GHz band to DEMS on the exception to the APA that waives APA

---

38 *Independent Guard Ass'n v. O'Leary*, 57 F.3d 766, 769-770, *amended*, 69 F.3d 1038 (9th Cir. 1995) (citations omitted); *see Tennessee Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir. 1992); *American Federation of Gov't Employees v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981).

39 *See, e.g., American Federation of Gov't Employees*, 655 F.2d at 1156.

40 *Action on Smoking and Health v. Civil Aeronautics Board*, 713 F.2d 795, 800 (D.C. Cir. 1983) ("Bald assertions that the agency does not believe comments would be useful cannot create good cause to forego notice and comment procedures."); *American Federation of Gov't Employees*, 655 F.2d at 1156.

requirements "to the extent that there is involved a military . . . function of the United States."[41] According to the Commission, its action was taken to "advance, support and accommodate the national defense."[42] Yet the Commission has failed to explain adequately or to support factually its conclusions that the relocation from 18 GHz of DEMS licensees outside of Washington, D.C. and Denver, or the specific relocation of DEMS to 24 GHz, in any way involve a "military function."

1. The Military Function Exception Does Not Support The Wholesale Relocation of DEMS From 18 GHz

According to the Commission, DEMS operations in Washington, D.C. and Denver, Colorado threaten to interfere with the Government's satellite needs in those areas. The Commission acknowledges that the goal of eliminating this interference could have been accomplished by relocating "the Washington, D.C. and Denver, Colorado [DEMS] operations only."[43] The Commission decided, however, that this option was not preferable, reasoning that "doing so would effectively preclude these areas from getting DEMS service, since it is *unlikely* that 24 GHz equipment could be manufactured at economic prices solely for these two markets."[44]

The Commission's desire to "maintain DEMS on a unified frequency band nationwide"[45] may or may not be a rational policy objective, but the Commission has not and cannot explain how the relocation of *all* DEMS licensees from the 18 GHz band -- the

---

41 5 U.S.C. § 553(a)(1).

42 DEMS Order at ¶ 1.

43 *Id.* at ¶ 11.

44 *Id.* (emphasis added).

45 *Id.*

overwhelming majority of which pose no interference potential to Government satellite operations -- falls within the "military function" exception to the APA. Moreover, the Commission has cited no evidence or analysis to support the relocation of all DEMS licensees, nor has it balanced the effects such a relocation might have on third parties who desire to use the spectrum into which DEMS has been relocated.

First, the Commission's policy conclusions as to the desirability of nationwide service at 18 GHz do not relate to a military function of the United States. Congress and the courts have emphasized that the "military function" exception to the APA is narrow in scope,[46] and is to be "narrowly construed and reluctantly countenanced."[47] In this case, the Commission itself *concedes* that the Government's "military function" goal would have been adequately served by the narrowly tailored remedy of relocating DEMS licensees *only* in the Denver and Washington, D.C. areas.[48] This was the only action necessary to "ensure the Government's current and future ability to operate military space systems in the 18 GHz frequency band."[49]

Taking broader regulatory action -- as the Commission did -- in order to effectuate other policy goals unquestionably exceeded the Commission's authority to bypass APA notice and comment requirements under the "military function" exception. Indeed, the DEMS Order affirms that DEMS licensees were not relocated from the 18 GHz band in areas outside of Washington, D.C. and Denver because of any interference with Government satellite operations, but instead were relocated to accommodate (1) the purely commercial needs of Teledesic's

---

46 *Independent Guard Ass'n,* 57 F.3d at 769.

47 *Id.* (quoting *Alcaraz v. Block,* 746 F.2d 593, 612 (9th Cir. 1984)).

48 DEMS Order at ¶ 11.

49 *Id.* at ¶ 18

satellite system[50] and (2) the speculative commercial problems that DEMS licensees in Washington, D.C. and Denver might face in procuring 24 GHz equipment.[51] Whether that accommodation is sound public policy remains to be seen -- but it certainly cannot justify depriving parties such as DIRECTV of the right to express their views before the Commission acts in a manner that fundamentally affects their existing and planned business ventures.[52]

Moreover, the Commission has not supported its conclusions in the DEMS Order regarding the necessity of relocating DEMS licensees from 18 GHz, nor has it considered the ramifications of such a relocation on other parties. For example, the Commission's suggestion that 24 GHz equipment will be commercially unavailable, or available at a higher cost, to DEMS licensees in Washington, D.C. and Denver, Colorado is utterly speculative. Such predictive judgments must be supported by some type of empirical, theoretical or record evidence.[53] The DEMS Order cites none. In addition, even if the Commission's assertion with respect to the

---

50 *See id.* at ¶ 10.

51 *Id.* at ¶ 11.

52 The Commission's reliance on *Bendix Aviation Corp. v. FCC*, 272 F.2d 533 (D.C. Cir. 1959), *cert. denied sub nom. Aeronautical Radio, Inc. v. U.S.*, 361 U.S. 965 (1960), to justify the sweeping action taken in the DEMS Order is misplaced. DEMS Order at ¶ 18. *Bendix* involved a reallocation of frequency bands that had been previously shared between Government and commercial users; in that case, the Commission dispensed with notice and comment and re-allocated the spectrum for exclusive Government use to meet "essential national defense requirements" for military radiopositioning operations. *Bendix*, 272 F.2d at 542. At most, the *Bendix* situation is analogous to the Commission's relocation of DEMS from areas in Washington, D.C. and Denver, CO, where there would be interference with Government operations. To the extent that the Commission has acted further to pursue policies that have no relationship to the national defense, *Bendix* is completely inapposite.

53 *See, e.g., Burlington Truck Lines v. United States*, 371 U.S. 156, 167 (1962) (agency decision must be supported by findings and analysis to justify choices made, and provide basis for exercise of its expert discretion); *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752 (6th Cir. 1995) (reversing FCC for failure to support its predictive judgment).

economics of manufacturing 24 GHz equipment for the Washington, D.C. and Denver areas were supported, the Commission still would be obligated to weigh its policy of ensuring nationwide DEMS service against the effects its proposed relocation of DEMS licensees would have on other parties, potential 24 GHz services, and other vitally important public policies. The Commission, for example, has "entirely failed to consider" relevant factors regarding the impact its DEMS relocation will have on entities, such as DIRECTV, that intend to operate in the 24 GHz band to which DEMS has now been relocated -- a hallmark of arbitrary and capricious agency action.[54] And there are a variety of important public interest reasons why the allocation of part of the 24 GHz band for BSS expansion capacity serves the public interest, not the least of which is providing capacity for DBS providers to become more effective competitors to entrenched cable monopolies. The Commission's decisions in the DEMS Order should not have been made without "any consideration whatsoever" of such factors or competing policies.[55]

2. **The Allocation of the 24 GHz Band for DEMS Also Has No Nexus to a Military Function**

Even assuming *arguendo* that the Commission's decision to relocate all DEMS licensees from the 18 GHz band could be construed to have a valid nexus to a "military function," the Commission's decision to relocate DEMS to the 24 GHz band cannot. Again, once the Commission decided to remove DEMS from the 18 GHz band, the Government's national security concerns were addressed. The Commission could have taken that action, and then initiated a rulemaking proceeding to determine the best new "home" for DEMS. But the

---

54 *Motor Vehicles Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42-43 (1983).

55 *Id.* at 51.

Commission instead attempted to use the basis of its decision to relocate DEMS *from the 18 GHz band* as a justification for its decision to relocate DEMS *to the 24 GHz band.* This attempted "bootstrapping" simply does not support the Commission's bypass of APA requirements.

The Commission states that its relocation of DEMS to 24 GHz "will facilitate, advance, support and accommodate the national defense."[56] Yet, the Commission's implication that actions that merely assist in the performance of military functions fall within the exception is fundamentally incorrect. The courts have clearly held that "military function" is determined by reference to the "specific function being regulated."[57] The exception is to be "narrowly construed," and invoked "only where the activities being regulated *directly involve* a military function."[58]

In this case, the "specific functions being regulated" by the Commission are the re-allocation of spectrum to DEMS, a commercial, non-military service owned and operated by private interests. The Government has absolutely no national security interest in the frequency band to which *any* DEMS licensee is relocated, or in whether *non-interfering* DEMS licensees are relocated from 18 GHz at all, so long as the Government's "military function" is not impaired. Once the Government was assured of its use of the 18 GHz band without interference at the locations in question -- Washington, D.C. and Denver -- its interest was satisfied, and "military function" vanished as a justification for further regulatory avoidance of proper administrative procedures.

---

56 DEMS Order at ¶ 1.

57 *Independent Guard Ass'n*, 57 F.3d at 769.

58 *Id.* (emphasis added).

3. Resolving NGSO/FSS Satellite Interference Issues Is Not A "Military Function"

The Commission's reliance on the military function exception is further undercut by the involvement of a private, commercial satellite service applicant with its own interest in seeing DEMS moved out of 18 GHz. The DEMS Order suggests that the complete relocation of DEMS licensees, rather than an accommodation only of the Government's interference concerns, was driven at least in part by alleged problems that Teledesic's satellite system would have in co-existing with DEMS licensees under the status quo. It is not mere coincidence that Teledesic's satellite license and the DEMS Order were issued on the same day. Indeed, it is Teledesic that is paying for the relocation of DEMS providers to the 24 GHz band.[59]

While DIRECTV understands the Commission's desire to seek a mutually beneficial solution for all of the different services, military and non-military, operating in the 18 GHz band, the Commission cannot craft a solution that tramples on the rights of other affected parties cloaked in the rationale of "military function." Unfortunately, the Commission's use of the exception to achieve a result that is broader than necessary, and that clearly favors the commercial interests of a single company at the expense of other providers, is "a perversion of the Commission's administrative processes for an improper purpose" that should be revisited by the Commission.[60]

---

59 DEMS Order at ¶ 10. The full terms of the reimbursement arrangement were not made public.

60 *Federal Broadcasting System, Inc. v. FCC,* 225 F.2d 560, 567 (D.C. Cir.), *cert. denied sub nom., WHEC v. Federal Broadcasting System,* 350 U.S. 923 (1955).

C. The Commission's Use Of The Good Cause Exception Also Was Improper

The Commission also attempts to justify its failure to conduct a notice and comment rulemaking regarding the decision to allocate the 24 GHz band to DEMS by invoking the "good cause" exception to the notice and comment requirement of the APA.[61] However, as with the "military function," the Commission stretches "good cause" well beyond the narrow contours of the exception.

1. The Commission Has Failed to Articulate "Good Cause" to Dispense With APA Requirements

In response to the Commission's assertion that notice and comment rulemaking was "unnecessary" in relocating DEMS,[62] it is important to state the obvious: the allocation of spectrum for a particular service is a major amendment to the Commission's rules that is normally accomplished through notice and comment rulemaking. In contrast, a rulemaking is "unnecessary" when it involves a "minor rule or amendment in which the public is not particularly interested."[63] The Commission's suggestion that notice and comment on its decision to allocate the 24 GHz band to DEMS is "unnecessary"[64] does not square with the judicially recognized and widely accepted meaning of that term under the APA.[65]

---

61 DEMS Order at ¶ 18; *see* 5 U.S.C. § 553(b)(3)(B).

62 DEMS Order at ¶ 18.

63 Tom C. Clark, Attorney General, United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 31 (1947), *reprinted in* Office of the Chairman, Administrative Conference of the United States, Federal Administrative Procedure Sourcebook: Statutes and Related Materials (1985).

64 DEMS Order at ¶ 18.

65 The Commission has, in the past, properly invoked the good cause exception for minor "ministerial correction[s]" that did not involve "a substantive change to the rules." *See Government Satellite Authorization Order,* 10 FCC Rcd at ¶ 5 n. 5 (adding footnote to spectrum allocation table to correct an inadvertent omission).

Neither has the agency explained why notice and comment procedures are "contrary to the public interest."[66] The law is clear that "[a] mere recitation that good cause exists, coupled with a desire to provide immediate guidance, does not amount to good cause."[67] Even if the situation presented here were the type of situation in which the good cause exception applied (and it clearly is not), the DEMS Order is defective in its failure to provide reasons that support a finding of good cause.

2. **No Exigent Circumstances Are Present To Warrant a "Good Cause" Finding**

This case simply does not present the exigencies that ordinarily support an agency finding of "good cause" to waive notice and comment procedures. The good cause exception was intended primarily to provide agencies with the ability to respond to emergency situations.[68] It was not meant to be an "escape clause" by which agencies can avoid their notice and comment responsibilities.[69] For this reason, the good cause exception, like the "military function" exception, is "narrowly construed and only reluctantly countenanced."[70] And nothing in the Commission's DEMS Order suggests that the Commission faced an emergency situation that required it to take any action to protect Government or commercial interests at 18 GHz, or to allocate the 24 GHz band for DEMS use, without notice and comment rulemaking.

---

66 DEMS Order at ¶ 18.

67 *Zhang v. Slattery*, 55 F.3d at 746 (2d Cir. 1995), *cert. denied*, 116 S.Ct 1271 (1996).

68 *Action on Smoking and Health v. Civil Aeronautics Board*, 713 F.2d at, 800; *see Tennessee Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir. 1992).

69 *Zhang*, 55 F.3d at 746; *Tennessee Gas Pipeline Co.*, 969 F.2d at 1144.

70 *Tennessee Gas Pipeline Co.*, 969 F.2d at 1144; *Action on Smoking and Health*, 713 F.2d at 800.

The Government has been authorized to use the 18 GHz band since July 1995 and was on notice of the DEMS licenses the Commission had been issuing in the band prior to that date.[71] From that time to the present, the Commission has been using "interim procedures" to prevent non-Government users of the 18 GHz spectrum from interfering with the Government's satellite operations.[72] Under the terms of the DEMS Order, only DEMS operations in the Washington, D.C. and Denver areas confront an imminent move to 24 GHz. Yet, even in that circumstance, the Commission cites nothing to suggest that interim measures could not or would not protect Government interests while the Commission determines the most appropriate course of action.

Nor will the minor delay caused by a notice and comment proceeding harm commercial interests. While DEMS may finally become a marketplace reality in the next few years, DEMS is hardly a thriving service depended on or used by substantial numbers of people.[73] Indeed, the Commission has permitted DEMS licensees to operate in the 18 GHz band until January 1, 2001 -- nearly four years from the date of the DEMS Order. The Commission's own timetable for transitioning DEMS licensees to new frequencies thus illustrates that there is no urgency present that might justify the serious deprivation of due process the Commission has effected here.

Finally, Teledesic's NGSO/FSS system is still years from operation. Although it may have a legitimate commercial need to resolve potential interference issues at 18 GHz,

---

71 DEMS Order at ¶¶ 13, 22.

72 *Id.* at ¶ 3.

73 Teledesic Order at ¶ 22 (Teledesic characterization of DEMS as a "defunct service").